SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. 75-1886

THE STATE OF TEXAS
EX REL RICHARD VOGTSBERGER,
Appellant - Petitioner

vs.

THE CITY OF WICHITA FALLS, TEXAS
Appellee - Respondent

JURISDICTIONAL STATEMENT FOR APPEAL TO THE UNITED STATES SUPREME COURT FROM THE SUPREME COURT OF TEXAS

and in the alternative,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PAUL O. WYLIE
County Attorney
Archer County, Texas

DOUTHITT & MITCHELL
FRANK J. DOUTHITT
ROBERT F. MITCHELL
P. O. Box 549
Henrietta, Texas

Attorneys for Appellant - Petitioner

Wichita Printing Co., 2914 Kemp, Wichita Falls, Texas 76308, (817) 723-7214

SUBJECT INDEX

INDEX OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No._____

THE STATE OF TEXAS
EX REL RICHARD VOGTSBERGER,
Appellant - Petitioner

vs.

CITY OF WICHITA FALLS, TEXAS
Appellee - Respondent

JURISDICTIONAL STATEMENT FOR APPEAL TO THE UNITED STATES SUPREME COURT FROM THE SUPREME COURT OF TEXAS

and in the alternative,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The State of Texas presents its jurisdictional statement in support of its appeal to this Court from the opinion and judgment of the Supreme Court of Texas and in the alternative, should the United States Supreme Court deem this appeal improvidently taken, the State of Texas prays that this Court treat this as an Application for Writ of Certiorari pursuant to 28 U.S.C. §2103.

OPINION BELOW

The Supreme Court of Texas issued its opinion in this cause on March 3, 1976. A copy of that opinion has been requested as a part of the record in this cause from the Clerk of the Supreme Court of Texas. It is found at 533 S.W.2d 927.

JURISDICTION

The opinion and judgment of the Supreme Court of Texas was entered on March 3, 1976. A timely petition for rehearing was denied on March 31, 1976, Appendix A Page A-1.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) as to the appeal from the Supreme Court of Texas. As to the Petition for Certiorari to the Supreme Court of Texas jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED

Is a single newspaper publication adequate notice as required by the due process clause of the Fourteenth Amendment as a prerequisite to annexation hearings which lead to final passage of ordinances including rural territory within a city and automatically making a comprehensive subdivision ordinance applicable[1] to the annexed area and to thousands of acres of rural territory nearby when there is no reason that personal notice to affected property owners cannot be given?

---

1. Appendix G, Sections 2 and 3, pages A-1477 and A-1477/1481.

The question herein presented is of substantial concern to the Appellant-Petitioner. If these ordinances are allowed to stand the owners of thousands of acres of land will be affected as herein described. However, the concern of the State is far greater than the instant case. Cities having such burdensome subdivision ordinances extending automatically to territory outside the city should be required to see that every affected landowner is given actual notice concerning proceedings which so seriously affect his land, especially when the ability to deliver the notice is so easy as compared to the permanent burdens facing that affected owner.

STATEMENT OF THE CASE

This is a quo warranto proceeding brought by the State of Texas attacking the validity of three annexation ordinances enacted by the City of Wichita Falls, Texas. The Trial Court held the ordinances void ab initio. In conclusions of law the Trial Court held the description in published notices of annexation hearings insufficient and the automatic application of the comprehensive subdivision ordinance too burdensome upon affected landowners for the utilized procedures. The Trial Court further held that such procedures failed to give those affected a voice therein and amounted to a denial of due process and equal protection of the law.[2]

The Court of Civil Appeals affirmed on two grounds, one being inadequacy of notice. The Supreme Court of Texas granted the City's Application for Writ of Error and the Conditional Application of the State of Texas. It did not address the issues of

---

2. Appendix F, paragraph 7, page A-26.

due process or equal protection of the law. The Supreme Court of Texas reversed and rendered judgment in favor of the City of Wichita Falls upholding the annexation ordinances in question. To reverse that Court had to find that the procedures used by the City of Wichita Falls did not violate due process or equal protection of the law.

ARGUMENT AND AUTHORITIES

The due process question presented herein has been raised by the State of Texas at every level in this proceeding. The State went to trial on its First Amended Petition and Information by Quo Warranto. Therein pleaded verbatim was the notice of annexation relative to the first ordinance in question. That notice, published only one time and in the morning Wichita Falls Record News on October 27, 1972, in the classified section described not only the tract in question but four other tracts under consideration. Preceeding the five legal descriptions which total over 42 column inches in the classified section set in six-point Agate type, appeared the following in the same size type:

"NOTICE OF ANNEXATION

> A public hearing shall be held at the regular meeting of the Board of Aldermen on November 7, 1972 at 10:00 in the Council Room in Memorial Auditorium in Wichita Falls to consider the annexation of the tracts hereinafter described, into the city limits, at which hearing all interested persons will be given an opportunity to be heard, to-wit:"

In the same pleading the State made the following allegation in paragraph 13 (TR 34):

> "The process of annexation and the resulting expansion of the extraterritorial jurisdiction

> violates the equal protection and due process clauses of the United States and Texas Constitutions in that such process is a taking of property without compensation and without representation of and by the damaged person or persons. The process is a unilateral action by the Respondent. The annexations pursuant to Section 2 of Article 1175 V.A.T.S. and pursuant to Article 970a V.A.T.S. and Section 3a of Respondent's Charter, not only annexed lands of Relator without compensation or representation, but also placed the lands of Relator (and others) within the five thousand foot nuisance corridor [Section 7(k), Wichita Falls City Charter] and within the extraterritorial jurisdiction of Relator *(sic)*.[3] Such action also makes applicable Realtor's *(sic)* comprehensive subdivision ordinance (Ordinance Number 2118) to all territory within Relator's *(sic)* extraterritorial jurisdiction. This unilateral action effectively pre-empts the territory within such extraterritorial jurisdiction and prevents the free use thereof by its owners, including the Relator."

In the same pleading, paragraph 5 of the prayer is as follows:

> "That the entire process herein used and all charter provisions and statutory provisions allowing such abuse be declared unconstitutional as herein alleged."

The City of Wichita Falls leveled no special exceptions at the pleadings and the case was tried upon stipulated evidence, which included the introduction into evidence of the notice in question and the comprehensive subdivision ordinance (TR. 47).

3. Should be Respondent.

In the Trial Court's Conclusions of Law it held that the description in the published notice was insufficient and that the automatic application of the comprehensive zoning ordinance created such burdens upon the owners of lands within the territory affected by that ordinance that the procedures utilized did not give those affected owners a sufficient voice in those procedures and was a denial of due process and equal protection of the laws. (TR. 61) The various legal briefs in the Appellate Courts will show that the State addressed this subject at every appellate level.

The comprehensive subdivision ordinance of the City of Wichita Falls places serious burdens upon those affected by it. Those affected include owners of land not only within the city but also within five miles thereof. Some of those burdens are so great as to amount to a virtual taking of property.

The territory annexed in the three ordinances attacked herein include only territory encompassed within rights-of-way for highway and pipeline purposes and a lake and city owned land around the lake. Lands burdened with the pipeline easements within the territory annexed and all lands within five miles of the annexed territory are included within the terms of the comprehensive subdivision ordinance.

If a dairy farmer with 600 acres covered by the comprehensive subdivision ordinance because of these annexations wanted to deed one acre to his son so the son could borrow money to build a home and continue the family business the father would be a "subdivider" and the land would be a "subdivision" under Section 3 of the ordinance. Apparently the entire tract would be affected. If the land deeded to the son were within the annexed area the father would be subject to a $100 a day fine for each day of violation under Section 13 of the ordinance.

A farmer affected by this comprehensive subdivision ordinance automatically applicable to him because he happens to be within the five mile reach of that ordinance because of the annexations under attack has serious restraints placed upon the alienation of his land. Although he might be able to sell lands in the entirety, the sale of a portion of his lands would be a subdivision under the ordinance. At best it would require his compliance with Section 4 of the ordinance securing a variance. This could easily be a time consuming process which might cost him the sale. Apparently, he would be required to survey the entire tract to sell off a portion when the survey may not be necessary and the sale could be described simply as, for example, the south half of the section involved. It is possible that Section 11 of the ordinance requires the establishment of park areas simply because of one sale. In any instance, the City would have the right to block the sale with injunctive relief pursuant to Section 14(E) of the ordinance.

A regulation which is so arbitrary and unreasonable as to become an infringement upon the right of ownership of property constitutes a violation of the due process of law clause of the 5th Amendment. *Chicago, Rock Island & Pacific Railway Company vs. United States of America,* 284 U.S. 80, 97, 76 L. Ed. 177, 186 (1931).

Where land is proposed to be taken and devoted to the public service, or any serious burden laid upon it, the owner of land must be given an opportunity to be heard with respect to the necessity of the taking and the compensation to be paid by the city. *Carson vs. Brockton Sewerage Commission,* 182 U.S. 398, 401 (1901).

The state legislature recognized the danger of annexation proceedings absent notice when it provided that railroads who were owners of real

property must be given notice. Article 970a, Section 6, V.A.T.S. Surely, this Court should require notice of a dignity at least equal to that of non-resident railroad owners who will be subjected only to additional taxation as for owners who are as much as three or five miles removed from the area to be annexed and who will be subjected to the serious burdens hereinbefore described.

The governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his use is not unlimited and cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare. *Village of Euclid vs. Ambler Realty Company,* 272 U.S. 365, 395 (1926), *Nectow vs. City of Cambridge,* 277 U.S. 183, 188 (1928). It may be that the annexation ordinances herein, standing alone do not require more notice than given in this case. However, when coupled with the effect of the comprehensive subdivision ordinance, not only on the territory being annexed but upon the vast expanse of rural lands nearby, actual notice should be required.

The right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. *Mullane vs. Central Hanover Bank & Trust Company,* 339 U.S. 306, 314, 94 L. Ed. 865, 873 (1950). The notice must be calculated under all circumstances to apprise interested parties of the pendency of this action. *Mullane, supra* at p. 314 and cases therein cited. In a condemnation case this Court relying upon *Mullane* said "it is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property". *Walker vs. Hutchinson,* 352 U.S. 112, 116, 1 L. Ed. 2d 178, 182 (1956).

This Court in a class action matter, noting that it had observed in *Mullane* that notice and an opportunity to be heard were fundamental requisites of the constitutional guarantee of procedural due process and that such notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of this action and afford them an opportunity to present their objections", determined that the plaintiff representing the class, whose claim was only $70.00, would be required to give individual notice to over two million members of the class, if they could be identified, at his expense. *Eisen vs. Carlisle & Jacquelin,* 417 U.S. 156, 40 L. Ed. 2d 732 (1974).

The burden on the City of Wichita Falls in this case to determine the names and addresses of the affected landowners would have been a simple matter indeed as compared to the *Eisen* case. The deed records and tax offices in the counties where the affected owners had property would reveal this information. Although there would have been some costs in mailing notice to affected landowners it would have been small indeed when compared to the cost of notifying over two million members of a class with only $70.00 at stake.

This Court again followed *Mullane* in a case where a non-resident landowner had not claimed damages for upstream diversion of water. New York City had complied with required notice provisions by publication in the *New York City Record,* two public newspapers published in New York City and two published in the county where the land was situated as well as posting notices in twenty places in the vicinity of the project and the affected land. Yet, relying on *Mullane, supra* and *Walker vs. Hutchinson, supra* this Court held notice to be inadequate where it would have been reasonably

easy to ascertain the address of the affected parties and mail notice *Schroeder vs. City of New York*, 371 U.S. 208, 9 L. Ed. 2d, 255 (1962).

A municipal ordinance regulating the operation of laundries within the city limits of San Francisco was held to violate the United States Constitution when it placed arbitrary power in the hands of muncipal authorities, *Yick Wo vs. Hopkins*, 118 U.S. 356 (1886). A reading of Section 3 of the comprehensive subdivision ordinance involved in this case is illustrative of the powers respecting variances (the securing of which alone are sufficient burdens to warrant reversal) which are placed in the Planning Board of the City of Wichita Falls.

When landowners are affected as in this proceeding the State has an interest that it must protect, the interest of the people. They could not be expected to even remotely consider the effect of these proceedings upon them simply by reading the notice of annexation hearing published in the newspaper one time.

CONCLUSION

The entire effect of these annexation ordinances coupled with the automatic and arbitrary application of the burdensome provisions of the comprehensive subdivision ordinance to affected landowners requires notice to those to be affected by such enactments and due process mandates their opportunity to have a voice in the proceedings leading up to those enactments. For the foregoing reasons this Court has jurisdiction to allow the appeal from the Supreme Court of Texas. Should this Court deem this appeal improvident, for the reasons stated this alternative Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Paul O. Wylie,
County Attorney
Archer County, Texas
Archer County Courthouse
Archer City, Texas 76351

Frank J. Douthitt
DOUTHITT & MITCHELL
P. O. Box 549
Henrietta, Texas 76365

Attorneys for the State of Texas, Appellant-Petitioner

APPENDICES

APPENDIX A

CLERK'S OFFICE - SUPREME COURT

AUSTIN, TEXAS, MARCH 31, 1976

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of CITY OF WICHITA FALLS vs. STATE EX REL VOGTSBERGER, No. B-5593 was this day overruled.

Very truly yours,

GARSON R. JACKSON
Clerk

APPENDIX B

IN THE SUPREME COURT OF TEXAS
No. B-5593

From Wichita Falls County, Second District

CITY OF WICHITA FALLS

vs.

STATE OF TEXAS,
EX REL RICHARD VOGTSBERGER

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Second Supreme Judicial District and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court that there was error in the judgments of the District Court and Court of Civil Appeals, it is, therefore, adjudged, ordered and decreed that said judgments be, and hereby are, reversed and set aside.

And this Court now proceeding to render judgment as should have been rendered below, it is considered, adjudged, ordered and decreed that the judgment be, and hereby is, rendered that respondent, State of Texas, Ex Rel Richard Vogtsberger (plaintiff in District Court), have and recover nothing of and from petitioner, City of Wichita Falls (defendant in District Court), by reason of this suit.

It is further ordered that respondent, State of Texas, Ex Rel Richard Vogtsberger, pay all costs expended and incurred in this Court, Court of Civil Appeals and District Court; that petitioner, City of Wichita Falls, have and recover of and from respondent, State of Texas, Ex Rel Richard Vogtsberger, the costs by it expended and incurred in said Courts, and that this decision be certified to the District Court of Wichita County, Texas, for observance.

(Opinion of the Court by Justice Steakley.)

APPENDIX C

IN THE SUPREME COURT OF TEXAS
No. B-5593

From Wichita County, Second District

CITY OF WICHITA FALLS, TEXAS
Petitioner

vs.

STATE OF TEXAS,
EX REL RICHARD VOGTSBERGER
Respondent

This is a quo warranto proceeding attacking the validity of several related annexation ordinances enacted by the City of Wichita Falls. The suit was brought by the State of Texas on the relation of Richard Vogtsberger, an affected property owner. The trial court concluded that the basic Ordinance No. 2756, and hence the dependent ordinances, were void and its judgment to such effect was affirmed by the Court of Civil Appeals. The stated reasons of the intermediate court were that the annexed territory was not adjacent to the pre-existent city limits; and that, upon the basis of a presumed finding that notice of the annexation was not carried in a publication of general circulation, there was want of requisite notice. 526 S.W.2d 618. We disagree in both respects and so reverse and render judgment for the City.

The City of Wichita Falls is a home rule city located in Wichita County with a population in excess of 50,000 but less than 100,000. In accordance with TEX. REV. CIV. STAT. ANN. art. 970a, §3.A(4) (1963), it has a three and one-half mile extra-territorial jurisdiction. The area attempted to be annexed by Ordinance No. 2756 was contiguous to the pre-existent boundaries of the City to the extent of the width of the right-of-way of U. S. Highway 281. The proposed annexation extended southward along the highway to a point of intersection with a water transmission line lying between Lake Arrowhead and the city limits. The annexed land then followed the water line eastward and ended at a point within the extra-territorial jurisdiction of the City. It is undisputed that the territory encompassed within Ordinance No. 2756 was contiguous to the boundaries of the City to the extent of the width of Highway 281; that all the annexed territory was within the extra-territorial jurisdiction of the City of Wichita Falls; and that there was no conflict with the boundaries or extra-territorial jurisdiction of any other municipality. Ordinance No. 2780 extended beyond the area annexed by Ordinance No. 2756 and along the right-of-way of the water transmission line for a distance less than three and one-half miles. Ordinance No. 2808 began at the terminus of the area annexed by Ordinance No. 2780 and included the remaining portion of the right-of-way of the water line, together with the area covered by Lake Arrowhead, also a distance of less than three and one-half miles. Ordinance No. 2808 specifically excluded any portion of the described area within the extra-territorial jurisdiction of the City of Scotland.

Citing *Fox Development Company v. City of San Antonio*, 468 S.W.2d 338 (Tex. 1971), the basic contention of the City of Wichita Falls, Petitioner,

is that the courts below were in error in holding Ordinance No. 2756 to be void for lack of adjacency. Respondent seeks to distinguish *Fox* on the ground that the instant case involves a direct attack in quo warranto, whereas the attack in *Fox* was collateral. Relying on *City of Wichita Falls vs. Bowen,* 143 Tex. 45, 182 S.W.2d 695 (1944), Respondent argues that in a direct proceeding of this nature the courts may consider the shape of the area to be annexed and the purposes for the annexation in determining the validity of annexation ordinances; and that there are tests or standards to be applied in quo warranto proceedings different from those to be utilized in collateral attacks. Respondent says, finally, that if controlling, *Fox* should be re-examined and overruled.

Traditionally, the courts of this State have not scrutinized the purpose of annexation ordinances or the use or character of the occupation of the annexed territory. Nor have our courts prescribed shape limitations. These are legislative prerogatives. *State ex rel. Pan American Production Co. v. Texas City,* 157 Tex. 450, 303 S.W.2d 780 (1957); *City of Gladewater v. State ex rel. Walker,* 138 Tex. 173, 157 S.W.2d 641 (1941); *State v. City of Waxahachie,* 81 Tex. 626, 17 S.W. 348 (1891); *Norris v. City of Waco,* 57 Tex. 635 (1882); and *State ex rel. Graves v. City of Sulphur Springs,* 214 S.W.2d 663 (Tex. Civ. App. - Texarkana 1948, writ ref'd n.r.e.). Generally speaking, the limitations fixed on the power of a city to annex additional territory by legislative enactments are that the territory be adjacent to existing boundaries and within the extra-territorial jurisdiction of the annexing city. Art. 970a, *supra; City of Waco v. City of McGregor,* 523 S.W.2d 649

(Tex. 1975); *Fox Development Company v. City of San Antonio, supra; State ex rel. Pan American Production Co. v. Texas City, supra.*[1]

Fox Development Company v. City of San Antonio, supra, involved a collateral attack on the validity of one of a group of "spoke" ordinances enacted by the City of San Antonio. The ordinance in controversy annexed the right-of-way of Highway 281 adjacent to the City of San Antonio. The area annexed was not included within and did not touch the city limits of any other city. We upheld the ordinance against the contention that it was void for want of adjacency. In so doing we reviewed essentially the same considerations urged by Respondent here, together with the ruling decisions of this Court, many of which we have noticed above. It was correctly said in *Fox*:

> . . . There is no suggestion in the decisions of our courts that there may be legal non-adjacency, notwithstanding actual contiguity, where annexation by, or adjacency to only one city is involved.

See also *City of Waco v. City of McGregor, supra;* and *City of Irving v. Dallas Country Flood Control District,* 383 S.W.2d 571 (Tex. 1964).

---

1. We note that Art. 970a, §7.B-1(a) (Supp. 1975) which became effective on September 1, 1975 provides:

> No home rule or general law city may annex any area whether publicly or privately owned, unless the width of such area at its narrowest point is at least 500 feet, except that a city having a population of twelve thousand (12,000) inhabitants or less may annex an area that is less than 500 feet in width if the corporate limits of the city are contiguous with the property on at least two sides.

Respondent does not contend that this limitation should be applied retroactively to the ordinances presently before us.

Respondent's reliance on *City of Wichita Falls v. Bowen, supra,* is misplaced. That case involved a collateral attack on the annexation of two airfields and the highway connecting them to the city. The ordinance covered the width of the highway for a distance of three to four miles before spreading out to cover the airfields. The Court of Civil Appeals held the annexation ordinance to be void on the ground that the land was not legally adjacent. This Court reversed, holding:

> . . . It is true, as shown by the opinion of the Court of Civil Appeals, that the land here annexed is only joined to the City by a narrow neck, but that fact, standing alone, could not render this ordinance void. *Neither the statute, Article 1175, supra, nor the charter of the City, defines or provides any length, width, shape, or amount of area of land that the City may annex.* It must follow, therefore, that any attack on this shape of the area included therein, *if it can be made at all, a matter we do not decide,* must be made in a direct proceeding to which the State is a party. (Emphasis added.)

It is apparent that *Bowen* reaffirmed established principles and did not reach or purport to decide the question at hand. Where there is compliance with statutory requirements, as here, the annexation ordinance must stand whether the attack is direct by quo warranto or collateral.

We agree with the Court of Civil Appeals that the description of the territory to be annexed by the ordinances in question was sufficient. See the cases there cited. We disagree with the rationale of the court in presuming that the newspaper carrying the notice of the proposed annexation proceedings was not a publication of the general circulation required

by statute, and hence that there was want of requisite notice. The Court of Civil Appeals initiated the conclusion that all of the evidence considered by the trial court was not brought forward, and that the court was required to presume in support of the judgment of the trial court that it was proved that the newspaper carrying the notice did not meet the requirement of TEX. REV. CIV. STAT. ANN. art. 970a, §6 (1963). We find no warrant for these conclusions. The ordinances were not attacked by the State upon this ground; and there is no suggestion in the record that this issue was tried by consent. Nor is there any showing that the appellate record did not reflect all of the evidence considered by the trial court. Indeed, the judgment of the trial court recited that:

> . . . the parties entered their appearance by counsel and the exhibits were introduced and evidence stipulated; thereafter, the stipulations, including the proof of the exhibits, were reduced to writing and filed in the record herein; attorneys for Petitioner and Respondent submitted Memorandum or Trial Briefs, containing not only law briefs but written argument; after considering all of the competent evidence, exhibits, briefs and arguments of counsel, the Court is of the opinion that judgment should be entered herein for Petitioner . . . .

The judgements below are reversed and judgment is here rendered that the State take nothing.

Zollie Steakley
Justice

OPINION DELIVERED: March 3, 1976

APPENDIX D

**IN THE COURT OF CIVIL APPEALS
FOR THE SECOND
SUPREME JUDICIAL DISTRICT OF TEXAS
No. 17636**

From the District Court of Wichita County

CITY OF WICHITA FALLS, TEXAS
Appellant

vs.

STATE OF TEXAS,
EX REL RICHARD VOGTSBERGER
Appellee

OPINION

The City of Wichita Falls accomplished procedure whereby it purported to annex certain territory lying in Wichita and Archer Counties, all to the southeast of its previously existent corporate limits wholly within Wichita County. There was no validation statute applicable thereto prior to the institution of this suit in Quo Warranto by the State of Texas upon the relation of Richard Vogtsberger. The suit constituted a direct attack upon the validity of the annexation.

Trial was to the court without a jury. Judgment was rendered to the effect that the City's annexation be set aside and annulled, and the City appealed.

We affirm.

We have concluded that while there was error, nevertheless there were two persisting grounds upon which the judgment should be affirmed. One reason is because, under the state of the record, there was want of requisite notice of the pendency of annexation proceedings. The other is because the City's Ordinance No. 2756 purported to annex territory which was not (and impliedly was factually found not to have been) "adjacent" to the pre-existent city limits. "Adjacency" would be a necessary requisite for valid annexation.

The points where the territory intended to be annexed touched the pre-existent boundary line of the City consisted in the width of U. S. Highway No. 281 as it entered the City from the south. For our purposes the width may be treated as 125 feet. From said pre-existent boundary line the "finger of land" sought to be annexed "took-off" - with such width as constant - down the highway toward the south, thence into open country to the east, and ending at the west boundary line of a tract of land called the H. & T. C. R.R. Survey, a distance of approximately 3.5 miles from the points of adjacency to the City of Wichita Falls.

One predicate for the judgment by the trial court was the holding among the Conclusions of Law filed that the description of the land to be annexed by Ordinance No. 2756 was insufficient. With this

holding we disagree. It is our opinion that by *State v. Wofford*, 90 Tex. 514, 39 S. W. 921 (1897), and by *Lower Nueces River Water Supply Dist. v. Cartwright* 274 S. W. 2d 199, 204, 205 (San Antonio Civ. App., 1954, writ ref., n.r.e.) that in a construction of the subject matter of the ordinance we should treat as certain that which might be made certain, exactly as would be the requirment in the construction of a statute. In a statutory construction it is the duty of a court, where it is possible, to ascertain the intent of the legislative body which has acted and when so ascertained to give effect to the intent; that there is not a requirement for the specificity which is the requirements of deeds. See also the authorities cited in *State v. City of Fort Worth*, 339 S. W. 2d 707, 709 (Fort Worth Civ. App., 1960, writ ref., n.r.e.). We believe that in the present instance the intent of the City in its enactment of Ordinance No. 2756 might be made certain. We therefore sustain the City's contention.

In comport with what is written in the foregoing paragraph, notice given to the public pursuant to the attempted annexation proceedings would in the ordinary case have been sufficient. There would have been sufficiency of notice in so far as it described the property to be annexed.

However, in the instant case we have the peculiar situation where the positive showing is by the partial Statment of Facts before us. In other words, it is not made to appear that we have before us on the appeal all that was before the trial court as evidence. And while we have the court's Conclusions of Law there are no Findings of Fact. At least one of the Conclusions of Law would indicate that denial of due process of the law as provided by our Constitution might lie in the court's implied fact finding that there was want of adequacy of notice to citizens whose

rights would be adversely affected by the annexation, and also to the State whose right-of-way on Highway No. 281 was intended to be annexed.

We know that there were Admissions of Fact by the parties filed upon request made therefor. And the Stipulations of Fact to which the parties agreed were reduced to writing and filed. These, along with the exhibits separately filed, constitute the Statement of Facts on appeal. But the foregoing does not necessarily constitute the whole of the evidentiary matter. Nothing anywhere in the record evidences that it did constitute the whole evidence before the trial court.

The judgment reads, in material part, as follows: ". . . the parties entered their appearance by counsel and the exhibits were introduced and evidence stipulated; thereafter, the stipulations, including the proof of the exhibits, were reduced to writing and filed in the record herein; attorneys . . . submitted Memorandum or Trial Briefs, . . . after considering all of the competent evidence, exhibits, briefs and arguments of counsel, the Court is of the opinion that judgment should be entered herein for Petitioner; . . . ." So-in the judgment where the court speaks of exhibits introduced and evidence stipulated it is left uncertain whether the whole of the evidence or only some of the evidence was stipulated. In such a circumstance, there being nothing elsewhere in the record in clarification, and since presumptions to be made are such as would support and not impair the judgment of the trial court, we consider ourselves obliged to read the judgment as to the effect that "some of the evidence" was stipulated, not that all the evidence was encompassed by the stipulation.

The result is that we must presume that the newspaper of the City of Wichita Falls, in which there was publication of the notice of the intended annexa-

tion (the City's Charter providing merely that there be publication in a newspaper of general circulation published in the City of Wichita Falls), was in the instant case shown by evidence not to have been a publication of general circulation in the territory proposed to be annexed outside the City and in part outside Wichita County - in Archer County lying to the south, the location of property of a number of persons affected, including that of the Relator in the case. The form of our statement is correct because it was the State's burden to prove the negative and not the City's burden to prove that the newspaper by which there was publication of notice did have general circulation in the territory annexed. 47 Tex. Jur. 2d, p. 587, "Quo Warranto", Sec. 23, "Burden of proof".

By provisions of V.A.T.S., Art. 970a, "Municipal Annexation Act", Sec. 6, "Notice and hearing — annexation proceedings", the publication of notice must be in a newspaper having general circulation both in the annexing city and also in the territory proposed to be annexed. In this case the City's notice, published in a paper in the City of Wichita Falls, complied with its Charter provision, but in view of the peculiar state of the record it appears that the notice did not comply with the provisions of statutory law protecting persons in or owning property in the area annexed. There was necessity for compliance with the provisions of both the Charter and the statute. Here, therefore, the judgment must be affirmed upon the theory that there was want of proper notice as provided by Art. 970a relative to territory proposed to be annexed, which want is to be presumed to have been proved. Here the article purports to prescribe the due process of law requisite with reference to notice in annexation cases. The contentions of the City are overruled as applied to its "notice" propositions and also upon its "due process" theory.

We believe and hold that on and prior to the approval and adoption of Ordinance No. 2756, annexation such as attempted was not merely vulnerable to direct attack as in the instant proceeding, but even to collateral attack. It would be a void annexation because of the legal non-adjacency of the premises intended to be annexed.

We may take judicial notice that the City is a Home Rule City, and we know that by our legislative enactments it has been granted certain enumerated powers as such. By V.A.T.S., Art. 1175, the power to annex additional territory lying adjacent to its incorporated boundaries was granted to it. Only such powers granted to it by the legislature may it possess and not additional or contradictory powers, for these would be reserved to the State as representative of its citizens. Therefore it was only land lying adjacent to the City's former boundaries which it had the power to annex.

In 1970, Justice Brewster of this Court made an exhaustive search into the state of the law in the attempt to resolve the question of whether an attempt by a municipality to annex territory was void. Culmination was the conclusion that an ordinance which purported to annex a strip of land 50 feet wide at the point it was adjacent to an existent municipality, and then "took off across country for 12½ miles and ended up by adjoining onto the limits of the City of Mansfield" was void for want of that adjacency requisite to the exercise of the power of annexation by Art. 1175. *City of Arlington v. City of Grand Prairie,* 451 S. W. 2d 284 (Fort Worth Civ. App., 1970, writ ref., n.r.e.). Therein those authorities which we believe controlling as applied to this case are referred to and relied upon.

It is the exercise of authority by the municipality seeking to effect annexation with which Art. 1175

deals. We reject the argument by the City that the rule of *City of Arlington v. City of Grand Prairie* should not be applied because all the cases relied upon involved contests between municipalities and did not involve situations where no municipality contested the annexation of territory by another. Furthermore there would not be a material distinction to be made in a case where one municipality contested the validity of annexation attempted by another from a case in which the contest was by the State pursuant to a suit in Quo Warranto.

The City relies on the decision and opinion in *May v. City of McKinney,* 479 S. W. 2d 114 (Dallas Civ. App., 1972, writ ref., n.r.e.). This is a most interesting case where the City of McKinney extended its boundaries by annexing areas consisting of "fingers of land" which were the highways/roadways and rights-of-way thereof leading from existent city limits in all directions away from that city, and for a distance of exactly one mile. The suit was a collateral, and not a direct attack, and it was filed by land owners whose property abutted upon the highway/roadway rights-of-way annexed. None of them had their property taken by the annexation (though their use of their own neighboring land would suffer regulatory burdens pursuant to the extra-territorial jurisdiction of the City following annexation). The State of Texas was not made a party to the suit. The Dallas Court of Civil Appeals held that the City's annexations were not void so as to be subject to collateral attack. The holding of the court was that the one-mile territorial extensions were contiguous and adjacent to the City's boundaries as theretofore existent, and, as such, were not void so as to be subject to collateral attack. Such had been the judgment of the trial court in the case, and its judgment was affirmed.

There obviously are hypothetical circumstances where the question of whether a finger or fingers of land sought to be annexed are or are not "adjacent" to pre-existent municipal boundaries would be a question of fact upon determination of which a proper judgment depended. It seems to us that in the City of McKinney case the trial court might have factually concluded, and probably did conclude factually, that there was the requisite "adjacency" entitling the City to annex the fingers of land there involved. Conversely, in the instant case we have the conclusion of law (which might be treated as having been based upon a finding of fact) that there was not the requisite "adjacency" entitling the City of Wichita Falls to annex the finger of land running into Archer County. Here, if the judgment of the trial court be unsupported as a legal proposition it would nevertheless find support as a one where there had been resolved the fact question upon "adjacency". The presumed finding was in favor of the State upon evidence justifying the conclusion that the requisite "adjacency" did not exist in this case.

In any event we find nothing in City of McKinney which necessarily conflicts with our decision here.

There were other Ordinances purporting to annex additional tracts of land which are under attack, but it is conceded that if the trial court was correct in its judgment as applied to Ordinance No. 2756 on the ground of want of "adjacency" then such other ordinances and annexations would necessarily be invalid since their validity depended upon proper annexation of territory by Ordinance No. 2756. The City's contentions as applied to Ordinance No. 2756 having been overruled by such a holding, its contentions of validity of the other ordinances are overruled as a consequence.

It is contended in this case that the trial court erred in holding that there was want of compliance with provisions relative to annexation in the City's own Charter and that the judgment might be upheld on that ground. We agree that the trial court did err, though that does not alter the necessity to affirm the judgment.

The language of the Charter directs that where enlargement of existent city boundary lines are proposed by an annexation ordinance that the ordinance describe the boundaries of the entire city as it would be enlarged in the event the proposed annexation be accomplished, etc. However, there is furthermore provided by the ordinance "as an alternative method of enlarging and extending the corporate limits" that the board of aldermen of the city shall have the power by ordinance to provide for the alteration and extension of the City's boundary limits and that upon conformity with certain rules relative to notice and hearing (not in question for these purposes) the boundary limits of the City shall thereafter be fixed as designated in the ordinance.

By the rules of statutory construction is is our holding that such alternative method authorized the City to annex additional territory in the same general manner as customarily used by other municipalities, i.e., by ordinance describing only the property to be annexed without necessity to additionally describe the boundaries of the entire City following accomplishment of the proposed annexation. The part of the charter requiring that an annexation ordinance describe the entire City as enlarged by its adoption is not spelled out as matter unnecessary to be made a part thereof, but we deem such to be necessarily implied by the "alternative method" prescribed. Therefore, the contention of the City is sustained.

Nevertheless, for other reasons stated, our sustaining the contention above considered does not entitle the City to have reversal.

Judgment is affirmed.

Frank A. Massey,
Chief Justice

APPENDIX E

IN THE
SEVENTY-EIGHTH DISTRICT COURT
Wichita County, Texas

Docket No. 97, 021-B

STATE OF TEXAS
EX REL RICHARD VOGTSBERGER
Petitioner

vs.

CITY OF WICHITA FALLS
Respondent

JUDGMENT

On November 8, 1974, came on to be considered the above entitled and numbered cause wherein the State of Texas, at the relation of Richard Vogtsberger is Petitioner and the City of Wichita Falls is Respondent; the parties entered their appearance by counsel and the exhibits were introduced and evidence stipulated; thereafter, the stipulations,

including the proof of the exhibits, were reduced to writing and filed in the record herein; attorneys for Petitioner and Respondent submitted Memorandum or Trial Briefs, containing not only law briefs but written argument; after considering all of the competent evidence, exhibits, briefs and arguments of counsel, the Court is of the opinion that judgment should be entered herein for Petitioner; it is accordingly,

ORDERED, ADJUDGED AND DECREED by the Court that Annexation Ordinance Number 2756 heretofore enacted by Respondent is void ab initio; that Annexation Ordinance Number 2780 is void ab initio; that other annexation ordinances dependent for adjacency or contiguity upon either Ordinance Number 2756 and/or Ordinance Number 2780 (specifically Annexation Ordinance Number 2808) are void ab initio; it is further ordered that all costs of suit be, and they are hereby adjudged against Respondent.

Respondent hereby excepts to the judgment of the Court and gives notice of appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, sitting in Fort Worth.

Signed and entered this fourteenth day of January, 1975.

Stanley Kirk
Judge Presiding

APPROVED AS TO FORM

Paul O. Wylie, County Attorney
Archer County, Texas

DOUTHITT & MITCHELL
Frank J. Douthitt
P. O. Box 549
Henrietta, Texas 76365

ATTORNEYS FOR PETITIONER

by_____
Frank J. Douthitt

H. P. Hodge, Jr., City Attorney
City of Wichita Falls, Texas

APPENDIX F

IN THE
SEVENTY-EIGHTH DISTRICT COURT
Wichita County, Texas

Docket No. 97, 021-B

STATE OF TEXAS
EX REL RICHARD VOGTSBERGER
Petitioner

vs.

CITY OF WICHITA FALLS
Respondent

CONCLUSIONS OF LAW

Pursuant to a request by the Respondent, City of Wichita Falls, and based upon all of the evidence submitted by a Request for Admission of Facts and Answers thereto, a Request for Answers to Written Questions and Answers thereto and the Stipulation of Facts and the Exhibits admitted, Argument and Briefs of Counsel, the Court makes the following conclusions of law:

1. This is a quo warranto proceeding in which the State of Texas is Petitioner, brought pursuant to Article 6253, Revised Civil Statutes of Texas.

2. The Respondent, City of Wichita Falls is a home rule city pursuant to Article 11, Section 5, Texas Constitution and Article 1175, Revised Civil Statutes of Texas.

3. The description of the territory designated as Tract II in Ordinance Number 2756 is insufficient.

4. The description of the territory used in the published notice of a hearing about annexation proceedings (insofar as Tract II of Ordinance 2756 is concerned) is insufficient to give notice of what territory is proposed to be annexed.

5. That the requirements of Section 3a of the City Charter of the City of Wichita Falls, when read with other sections of that charter relative to the alteration of the corporate limits of the city require that the corporate limits of the entire city be described as the same will exist after the annexation is complete.

6. That a strip of territory that touches the existing city limits of Wichita Falls only the width of the right-of-way of Highway 281 (less than 500 feet) and extending some 3.5 miles is, as a matter of law, not adjacent to the City of Wichita Falls.

7. That the automatic application of such a comprehensive zoning ordinance as Ordinance 2118 to territory annexed and territory brought within the extraterritorial jurisdiction of the annexing city by such annexation creates such burdens upon the owners of land within the territory that the annexation procedures utilized in this case do not give those affected owners a voice in such procedures and amount to a denial of due process and equal protection of the laws as to those affected owners.

8. The territory described in Ordinances Number 2780 and 2808 is not adjacent nor contiguous to the City of Wichita Falls and the ordinances are therefore void.

Signed this twenty-eighth day of January, 1975.

Stanley Kirk
Judge Presiding

APPENDIX G

COMPREHENSIVE SUBDIVISION ORDINANCE*

ORDINANCE NUMBER 2118

DECLARATION OF THE POLICY AND THE RULES AND REGULATIONS GOVERNING THE PLATTING AND SUBDIVIDING OF LAND IN AND ADJACENT TO THE CITY OF WICHITA FALLS, TEXAS.

BE IT ORDAINED By the Board of Aldermen of the City of Wichita Falls, Texas:

Sec. 1. Authority.

The provisions of Chapter 231, Acts of the 40th Legislature, Regular Session, 1927, as heretofore or hereafter amended (compiled as Article 974a, V.T.C.S.) and the provisions of Section 4 of the Municipal Annexation Act as heretofore or hereafter amended (compiled as Article 970a, V.T.C.S.) are hereby adopted. This ordinance is adopted pursuant to the provisions of the Charter of the city.

Sec. 2. Purpose.

The purpose of this ordinance is to provide for the orderly, safe and healthful development of the area within the city and within the extraterritorial jurisdiction of the city as described in Article 970a, V.T.C.S., and to promote the health, safety and general welfare of the community.

Sec. 3. Definitions.

For the purpose of this ordinance, the following terms, phrases, words and their derivations shall have the meaning ascribed to them in this section:

*Editor's note—Ordinance No. 2118, the city's subdivision ordinance, is printed in this appendix as originally adopted by the board of aldermen on September 28, 1964.

Cross references—Mobile home subdivision regulations generally, see §§ 30-10.1, 30-10.2; extensions of sewer and water mains generally, Ch. 32, Art. IV.

Alley. An "alley" is a minor public right-of-way, not intended to provide the primary means of access to abutting lots, which is used primarily for vehicular service access to the back or sides of properties otherwise abutting on a public street.

Building setback line. The "building setback line" is the line within a property defining the minimum horizontal distance between a building and the adjacent street line.

Board. The "board" is the Planning Board of the City of Wichita Falls, Texas.

Cul-de-sac. A "cul-de-sac" is a minor street having but one vehicular access to another street and terminated by a vehicular turnaround.

Dead-end street. A "dead-end street" is a street, other than a cul-de-sac, with only one outlet.

Utility easement. "Utility easement" is an interest in land granted to the City for installing and maintaining utilities, across, over or under private land together with the right to enter thereon, with machinery and other vehicles necessary for the maintenance of said utilities.

Lot. A "lot" is an undivided tract or parcel of land having frontage on a public street and which is, or in the future may be, offered for sale, conveyance, transfer or improvement; which is designated as a distinct and separate tract; and which is identified by a tract or lot number or symbol in a duly approved subdivision plat which has been approved by the planning board and properly filed for record.

Mobile home subdivision. A "mobile home subdivision" is a subdivision of not less than four (4) acres in size which is created for the exclusive purpose of providing lot sites for sale for residential occupancy by mobile homes. (Ord. No. 2752, § 2, 11-7-72)

Public right-of-way. A "public right-of-way" is a strip of land used, or intended to be used, wholly or in part, as a public street, alley, walkway or drain.

Pavement width. The "pavement width" is the portion of a street available for vehicular traffic; where curbs are laid, it is the portion between the face of curbs.

Streets. A "street" is a public right-of-way which provides vehicular access to adjacent land, whether designated as a

street, highway, thoroughfare, parkway, throughway, avenue, lane, boulevard, road, place, drive, expressway, freeway, or however otherwise designated.

(1) An "arterial street" is one used primarily to provide circulation to various sections of the city.

(2) A "collector street" is one used primarily to provide circulation within the neighborhood, to carry traffic from minor streets to arterial streets or to carry traffic through or adjacent to commercial, industrial or high population density areas such as large apartment developments.

(3) A "marginal access street" is a minor street which is parallel and adjacent to an arterial street and which is used primarily to provide access to abutting properties and protection from through traffic.

(4) A "residential street" is one used primarily for access to abutting residential property.

Subdivider. A "subdivider" is any person or any agent thereof, dividing or proposing to divide land so as to constitute a subdivision as that term is defined herein. In any event, the term "subdivider" shall be restricted to include only the owner, equitable owner, or authorized agent of such owner or equitable owner, of land sought to be subdivided.

Subdivision. A "subdivision" is the division of any tract of land situated within the corporate limits, or within five miles of such limits, into two or more parts. Subdivision includes re-subdivision. The term "townhouse subdivision" shall apply to those developments in which it is proposed to partition land into individual lots and construct townhouses which may be individually owned and where lot sizes and specifications are to be different from those otherwise required by these subdivision regulations. (Ord. No. 2396, § 1, 1-22-68; Ord. No. 2767, § 1, 2-20-73)

Shall, may. The word "shall" is always mandatory. The word "may" is merely directory.

Preliminary plat. A "preliminary plat" is a tentative drawing made by a licensed surveyor or registered engineer for

inspection purposes only, showing the entire tract of land sought to be subdivided, accurately describing all of said subdivision or addition by metes and bounds, locating the same with respect to an original corner of the original survey of which it is a part and giving dimensions thereof of said subdivision or addition, and dimensions of all streets, alleys, squares, parks or other portions of same intended to be dedicated to public use, or for the use of purchasers or owners of lots fronting thereon or adjacent thereto.

Master plat. A "master plat" is a properly prepared preliminary plat which is used or proposed to be used as an overall guide for the submission of portions of the plat for final plat approval at various times.

Final plat. A "final plat" is a plat prepared by a licensed surveyor or registered engineer and submitted to the board for final approval which is duly acknowledged by the owners or proprietors of the land, or by some duly authorized agent of such owners or proprietors, in the manner required for the acknowledgment of deeds and which is to be filed for record in the office of the county clerk of the county or counties in which the land lies.

Plat. A "plat" shall refer to both preliminary and final plats and shall be determined by the section in which it appears.

Engineer. An "engineer" is a person duly authorized under the provisions of the Texas Engineering Registration Act, as heretofore or hereafter amended, to practice the profession of engineering.

Surveyor. A "surveyor" is a person duly authorized under the provisions of the Texas Registered Public Surveyors Act, as heretofore or hereafter amended, to practice the profession of public surveying.

City. "City" is the City of Wichita Falls, Texas.

City council. "City council" is the board of aldermen of the City of Wichita Falls, Texas.

Master plan. "Master plan" is a comprehensive plan of the city adopted by the board of aldermen of the City of Wichita Falls, Texas.

Person. A "person" is an individual, association, firm or corporation.

Border lines. "Border lines" are water or sewer lines which abut one or more sides of a subdivision, but which serve other land as well as the land in such subdivision.

On-site lines. "On-site lines" are water or sewer lines within a subdivision, or water or sewer lines abutting one or more sides of a subdivision which serve only land in such subdivision.

Office. Any office referred to in this ordinance by title means the person retained by the city in that position or his duly authorized representative.

Townhouse. The term "townhouse" shall mean a structure which is one of a series of dwelling units designed for single family occupancy, which dwelling units are structurally connected or immediately adjacent to each other without side yards between individual dwelling units. (Ord. No. 2767, § 1, 2-20-73)

Open space. The term "open space" in a townhouse subdivision shall apply to private property under common ownership designated for recreation area, private park (for use of owners within the subdivision), play lot area, plaza area, and ornamental areas open to general view within the subdivision. Open space does not include streets, alleys, paved access streets or drives and parking areas. (Ord. No. 2767, § 1, 2-20-73)

Definitions not expressly prescribed herein are to be construed in accordance with customary usage in municipal planning and engineering practices.

Sec. 4. Variances.

The board may authorize a variance from these regulations when, in its opinion, undue hardship will result from

requiring strict compliance. In granting a variance, the board shall prescribe only conditions that it deems necessary or desirable to the public interest. In making the findings hereinbelow required, the commission shall take into account the nature of the proposed use of the land involved, existing uses of land in the vicinity, the number of persons who will reside or work in the proposed subdivision, and the probable effect of such variance upon traffic conditions and upon the public health, safety, convenience and welfare in the vicinity. No variance shall be granted unless the board finds:

(1) That there are special circumstances or conditions affecting the land involved such that the strict application of the provisions of this ordinance would deprive the applicant of the reasonable use of his land.

(2) That the variance is necessary for the preservation and enjoyment of a substantial property right of the applicant.

(3) That the granting of the variance will not be detrimental to the public health, safety or welfare or injurious to other property in the area.

(4) That the granting of the variance will not have the effect of preventing the orderly subdivision of other land in the area in accordance with the provisions of this ordinance. Such findings of the board, together with the specific facts upon which such findings are based, shall be incorporated into the official minutes of the board meeting at which such variance is granted. Variances may be granted only when in harmony with the general purpose and intent of this ordinance so that the public health, safety and welfare may be secured and substantial justice done. Pecuniary hardship to the subdivider, standing alone, shall not be deemed to constitute undue hardship.

Sec. 5. Preliminary conference.

Prior to the official filing of a preliminary plat, the subdivider may consult with and present a proposed plan of subdivision to the city planner for comments and advise on

the procedures, specifications and standards required by the city for the subdivision of land.

Sec. 5.1. Fee for reviewing and processing plats.

At the time a subdivider applies to the planning division for approval of a preliminary plat or final plat or replat, he shall pay to the City of Wichita Falls a fee to cover the costs of reviewing and processing the plat. This fee shall be in addition to other fees required by the city or county. The amount of the fee shall be based on the number of lots or parcels in the proposed subdivision and shall be computed from the following schedule:

No. of Lots	*Fee for Preliminary Plats*	*Fee for Final Plats*
1—5	$20.00	$20.00
6—10	25.00	25.00
11—25	35.00	35.00
26—50	45.00	45.00
Over 50	50.00 plus $0.50 for each lot over 100	50.00 plus $0.50 for each lot over 100

The following type of plats are specifically exempt from the payment of fees:

(1) Plats submitted by the City of Wichita Falls or any of its departments.

(2) Plats submitted by any governmental or educational agency.

(3) Plats submitted to correct minor drafting errors in recorded plats.

(4) Plats filed for the purpose of dedicating land to the City of Wichita Falls in which no other subdivision of land is shown.

(5) Replats occasioned by governmental action.

(6) Replats modifying five (5) lots or less. (Ord. No. 2745, 11-7-72)

Sec. 6. Preliminary plat and accompanying data.

General. Whenever a subdivider desires to make a subdivision, he shall cause to be prepared a preliminary plat by a surveyor or engineer in accordance with this ordinance.

Time for filing and copies required. The subdivider, his engineer or surveyor, shall file nine (9) blue or black line copies of the plat, together with a reproducible sepia with the city planner, at least nine (9) days prior to date that formal application for the preliminary plat approval is made to the planning board.

Form and content. The plat shall be drawn on sheets eleven by eighteen inches (11"x18") or twenty-two by thirty-six inches (22"x36") with a minimum three-quarter inch (¾") binding margin on the left side of the sheet and one-quarter inch (¼") margins on the other three sides. The plat shall be drawn to a scale of one hundred (100) feet to the one (1) inch. When more than one sheet is necessary to accommodate the entire area, an index sheet showing the entire subdivision at an appropriate scale shall be attached to the plat. The plat shall show the following:

(1) Names and addresses and phone numbers of the subdividers, record owner, engineers and surveyor.

(2) Proposed name of the subdivision which shall not have the same spelling as or be pronounced similar to the name of any other recorded subdivision located within the city or within five (5) miles of the city. The name shall appear at the top of the drawing and shall be the largest lettering on the plat.

(3) Names of adjacent subdivisions and the owners of adjoining parcels of unsubdivided land, and an indication of whether or not adjacent properties are platted.

(4) Legal description of the subdivision by metes and bounds.

(5) Primary control points or descriptions and ties to such control points to which all dimensions, angles, bearings, block numbers and similar data shall be referred.

(6) Subdivision boundary lines indicated by heavy lines and the computed acreage.

(7) Existing sites as follows:

(a) The location, dimensions, name, description, and purpose of all existing or recorded streets, alleys, reservations, easements or other rights-of-way within the subdivision, intersecting or adjacent to its boundary or forming such boundary. Areas previously dedicated and shown on the plat shall have a statement shown in the affected area stating that it has been previously dedicated.

(b) The location, dimensoins, description, name and purpose of all existing or recorded residential lots, parks, public areas, permanent structures and other sites within or adjacent to the subdivision.

(c) The location, dimensions, description, and flow line of existing watercourses and drainage structures within the subdivision or on adjoining tracts.

(d) All existing features shall be shown by dotted lines.

(8) The location, dimensions, description, and name of all proposed streets, alleys, drainage structures, parks, other public areas, reservations, easements or other rights-of-way, residential lots and other sites and all rights-of-way and other public areas dedicated shall state within that area that the property is "herein dedicated".

(9) Date of preparation, written and graphic, scales of plat, and north arrow.

(10) Topographical information shall include contour lines on two (2) vertical feet intervals.

(11) A number to identify each lot or site. Block numbers may be used, but continuous lot numbering through an addition is more desirable.

(12) Front building setback lines on all lots and sites. Side yard building setback lines at street intersections.

(13) Location of city limits line and the outer border of the city's extraterritorial jurisdiction if they traverse the subdivision, form part of the boundary of the subdivision or are adjacent to such boundary.

Processing of preliminary plat.

(a) The city planner shall check the preliminary plat as to its conformity with the master plan, major street plan, land use plan, and the standards and specifications set forth herein or referred to herein.

(b) Pertinent copies of the plat shall be submitted to various city departments for a check of the same for conformity with the standards and specifications contained or referred to herein.

(c) The various departments shall return comments to the city planner with their recommendations and/or requirements as to modifications, additions or alterations of such plat, if any.

(d) City staff recommendations will be presented to the board for their review and consideration at the meeting.

(e) The board shall determine whether the lands are suitable for platting. The services of any department of the city may be utilized to this end. Land subject to flood or deemed to be topographically unsuitable because of relief, drainage, soil character or other conditions shall not be platted for any use which may increase the danger to health, life or property or aggravate erosion or flood hazard.

(f) Within thirty (30) days after the preliminary plat is formally filed, the board shall conditionally approve or disapprove such plat or conditionally approve it with modifications. If it is conditionally disapproved or conditionally approved with modifications, the board shall inform the subdivider of the reasons within ten (10) days of the time such action is taken.

(g) Approval or conditional approval of a preliminary plat by the board shall be deemed an expression of approval of the layout submitted on the preliminary plat as a guide to the installation of streets, water, sewer and other required improvements and utilities and to the preparation of the final or record plat. Approval or conditional approval of a preliminary plat shall not constitute automatic approval of the final plat.

(h) Approval or conditional approval of a preliminary plat shall be effective for one year unless reviewed by the board in the light of new or significant information which would necessitate a revision of the preliminary plat.

(i) If no development has occurred which would affect the proposed plat, at the end of the year of effective approval, the board may, upon application of the subdivider, extend

the approval another year without the submission of a new preliminary plat by voting an approval of the original preliminary plat. (Ord. No. 2485, § 1, 2-18-69)

Declaration to be filed with townhouse subdivision preliminary plat.

A proposed declaration of covenants, conditions and restrictions for a townhouse subdivision shall be submitted with the preliminary plat. This document shall contain, in addition to other requirements set forth by the developer, the following requirements:

(1) Legally create an automatic-membership home owners association with responsibility and authority to administer the provisions of the declaration.

(2) The home owners association has legal title to the common property or will receive legal title to it within a specified period.

(3) The owner of each home or lot automatically becomes a voting member of the association and his membership is automatically transferred to the new owner of a home or lot when it is sold.

(4) The right of each member to use the property and any limitation on his use of it is defined in the declaration.

(5) The association is legally responsible for operating and maintaining the common property.

(6) Guarantee the restoration or reconstruction of any dwelling unit which is destroyed or damaged, unless otherwise voted upon by the home owners association. The home owners association may vote to remove all building remains and add the cleared lot area to the open space until a new unit is constructed.

(7) Each member's share of the association's expenses is reasonable and adequate to enable the association to function properly.

(8) The consequences of nonpayment of a member's share of the expenses are defined, and adequate legal

measures for recovering any nonpayment are available. (Ord. No. 2767, § 2, 2-20-73)

Site plan to be filed with townhouse subdivision preliminary plat.

A site plan shall be submitted with the preliminary plat of the townhouse subdivision and shall include the following:

(1) Location and dimensions of all lots, access drives, common open space areas, dedicated streets, and parking space.

(2) Location of all structures and appropriate dimensions.

(3) Calculated density in terms of dwelling units per gross acre.

(4) Tabulation of the total number of acres in the proposed project and the percentage thereof designated for common open space. (Ord. No. 2485, § 1, 2-18-69; Ord. No. 2767, §§ 2, 3, 2-20-73)

Sec. 7. Final plat.

(a) The final plat and accompanying data shall conform to the preliminary plat approved or conditionally approved, incorporating all changes, modifications, alterations, corrections and conditions imposed by the board.

(b) The final plat shall be in the same number and contain all of the features required for preliminary plats in section 6 above, and it shall be accompanied by the following improvement data bearing the seal of an engineer.

Sanitary sewers. Three (3) copies of the proposed plat showing appropriate contours and the proposed location and size of existing sanitary sewer lines.

Water. Three (3) copies of the proposed plat showing the location and size of existing and location of proposed water line and fire hydrants.

Storm drainage.

(a) Three (3) copies of the proposed plat with appropriate contours. All street widths and grades shall be indicated on the plat and runoff figures shall be indicated on the outlet and inlet side of all drainage ditches and storm sewers and

at all points in the street at changes of grade or where the water enters another street or storm sewer or drainage ditch. Drainage easements shall be indicated.

(b) Calculations showing the anticipated storm water flow including watershed area, per cent runoff and time of concentration. When a drainage ditch or storm sewer is proposed, all calculations shall be submitted showing basis for design, which shall conform to the city's master drainage plan.

(c) The final plat and the accompanying site improvement data shall be approved by the director of public works.

(d) In addition to the various requirements for the preliminary plat, the final plat shall also include the following:

(1) The exact location, dimensions, name, description, and purpose of all existing or recorded streets, alleys, reservations, easements or other rights-of-way within

the subdivision, intersecting or adjacent to its boundary or forming such boundary, with accurate dimensions, bearing or deflecting angles and radii, area, and central angle, degree of curvature, tangent distance and length of all curves where appropriate. Areas previously dedicated and shown on the plat shall have a statement shown in the affected area stating that it has previously been dedicated.

(2) The exact location, dimensions, description, name and purpose of all proposed streets, alleys, drainage structures, parks, other public areas, reservations, easements or other rights-of-way, residential lots, and other sites, with accurate dimensions, bearing or deflecting angles. These areas dedicated for public use shall state that they are "herein dedicated" within the area affected.

(e) The final plat shall also include the following:

(1) Owner's acknowledgement:

State of Texas
County of .....

The owner of land shown on this plat and whose name is subscribed hereto, and in person or through a duly authorized agent hereby dedicates to the use of the public forever all streets, alleys, parks, watercourses, drains, easements and public places thereon shown for the purpose and consideration therein expressed.

.....

Owner

State of Texas
County of

Before me, the undersigned authority, on this day personally appeared ....., known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and considerations therein expressed and in the capacity therein stated.

Given under my hand and seal of office this day of ....., 19 ..... .

.....

Notary Public, ... County, Texas.

(2) Certificate by director of public works:
The director of public works of the City of Wichita Falls, Texas, hereby certifies that this subdivision plat conforms to all requirements of the subdivision regulations as to which his approval is required.

.....

Director of Public Works

(3) Approval of the planning board of the city:
This plat ....., has been submitted to and considered by the Planning Board of the City of Wichita Falls, Texas, and is hereby approved by such Board.
Dated this ..... day of ....., 19 ..... .

By: .....

Chairman

By: .....

Secretary

(4) Surveyor's certification:
I hereby certify that this plat has been prepared from an actual and accurate field survey of the land under my personal supervision on ..... (Date); and that all information shown is true and correct; and that all monuments shown thereon were properly placed under my personal supervision, in accordance with the subdivision regulations of the City of Wichita Falls, Texas.

.....

Surveyor

(5) A certificate from the city tax collector and from the proper official of all other taxing authorities within whose jurisdiction the proposed subdivision lies to the effect that all ad valorem taxes have been paid on the land included within the subdivision.

(f) If desired by the subdivider, the final plat may constitute only that portion of the approved preliminary plat which he proposes to record and develop. However, such portion shall conform to all the requirements of this ordinance.

(g) As soon as practical after the subdivider is notified of the approval of the preliminary plat, his engineer or surveyor shall submit to the board at an official meeting the final plat of the subdivision or portion thereof.

(h) No final plat will be considered unless a preliminary plat has been approved by the planning board except, however, if an approved plat has been duly recorded and the subdivider wishes to increase the size of the lots by combining two (2) or more lots or combining one lot with a portion of the adjacent lot in such manner that no portion of a lot remains smaller than the original lots, or if circumstances prevail in which a single unplatted parcel may be platted into one or two lots in only one obvious manner, no preliminary plat will be necessary. The planning department shall determine the necessity of preliminary plats in such cases.

(i) A final plat of an approved preliminary plat or a portion thereof shall be submitted to the board within a year of the date of approval of preliminary plat, otherwise the approval of the board shall become null and void unless an extension of time is applied for and granted by the board.

(j) All approved plats shall be filed for record by the subdivider or his representative within thirty (30) days of the date of final approval of the plat, thereafter, the board may at any time cancel such approval. Reapproval will only be necessary when the board has withdrawn its approval or changes have been made in the plat.

(k) No changes, erasures, modifications or revisions shall be made in any final plat of a subdivision after approval has been given by the board and endorsed on the plat in writing, unless said change, revision or modification is first submitted to and approved by the board.

(l) The city engineer and director of public utilities shall furnish the director of public works with written certifica-

tions that all improvements required under section 7 hereof have been completed prior to submittal of the final plat, or that sufficient cash has been deposited, or surety bonds furnished to secure completion of all required improvements. If bonds are furnished in lieu of cash or required improvements, a bond covering street, storm water, or alley improvements shall be submitted to the city engineer. A separate bond covering water and sewer improvements shall be submitted to the director of public utilities. Surety bonds furnished in lieu of a part or all of the required improvements shall be examined and approved by the city attorney to determine the validity of said bonds. A time limit of twelve (12) months shall be stipulated by the bonds for completion of all improvements covered by such bonds. The city engineer and director of public utilities shall determine if such bonds are of sufficient amount to complete necessary improvements. Any such surety bonds shall be filed, together with a copy of a final plat and construction plans, in the office of the city clerk. No final plat shall be approved by the director of public works until certificates of improvement have been provided. (Ord. No. 2506, §§ 1, 2, 6-17-69)

Amendment note—Ord. No. 2506, § 1, amended § 7(h) of Appendix A by requiring approval rather than submission before a final plat would be considered, and by adding provisions concerning platting in only one obvious manner and determination of the necessity of preliminary plats. Section 2 of said ordinance added paragraph (l) to § 7.

Sec. 8. Construction.

(a) Staking for the proposed street construction will be done by the engineering division of the public works department. Upon notice from the developer of an intent to commence construction, the alignment and subgrade cut stakes will be laid out. Upon completion of the installation of all utilities and a statement from each utility concerned that utilities have been installed in accordance with this ordinance, then the engineering division will provide final construction stakes for completion of street and alley paving.

Upon completion of the street and alley improvements, the city engineer will inspect the finished work and provide the developer with a letter of approval. The date of commence-

ment of a one year maintenance period for all street construction will begin at such time as a letter of approval is issued. (Ord. No. 2506, § 3, 6-17-69)

Amendment note—Ord. No. 2506, § 3, amended § 8 by deleting paragraph (b), formerly providing that no certificate of occupancy would be issued until utility installations and street constructions were completed.

Sec. 9. Standards and specifications.

No preliminary or final plat shall be approved by the board and no completed site improvements shall be accepted by the director of public works unless they conform to the following standards and specifications:

(A) *General.*

(1) CONFORMITY WITH MASTER PLAN. The subdivision shall conform to the master plan and the parts thereof.

(2) PROVISIONS FOR FUTURE SUBDIVISIONS. If a tract is subdivided into parcels larger than ordinary building lots, such parcels shall be arranged to allow the opening of future streets and logical future subdivision.

(3) RESERVE STRIPS PROHIBITED. There shall be no reserve strips controlling access to land dedicated or intended to be dedicated to public use.

(4) SUITABLE BUILDING SITES. Every lot must contain a suitable building site.

(5) SUITABILITY OF LAND USE. Land shall be suited to the purpose for which it is to be used.

(B) *Streets.*

(1) STREET LAYOUT. Adequate streets shall be provided by the subdivider, the arrangement, character, extent, width, grade and location of which shall conform to the master plan and shall be considered in their relation to existing and planned streets, to topographical conditions, to public safety and convenience, and in their appropriate relation to the proposed uses of the land to be served by such streets. The street layout shall be devised for the most advantageous development of the entire neighborhood development.

(2) RELATION TO ADJOINING STREET SYSTEM. Where necessary to the neighborhood pattern, existing principal streets in adjoining areas shall be continued and shall be at least as wide as such existing streets and in alignment therewith.

(3) PROJECTION OF STREETS. Where adjoining areas are not subdivided the arrangement of streets in the subdivision shall make provision for the proper projection of streets into such unsubdivided areas.

(4) STREET JOGS. Street jogs, with center line off-sets of less than one hundred twenty-five (125) feet shall be avoided.

(5) HALF STREETS OR ADJACENT STREETS. In the case of minor or marginal access streets, no new half-streets shall be platted.

(6) STREET INTERSECTIONS. Street intersections shall be as nearly at right angles as practicable, giving due regard to terrain and topography.

(7) DEAD-END STREETS. Dead-end streets shall be prohibited except as short stubs to permit future expansion.

(8) CUL-DE-SACS. In general, cul-de-sacs shall not exceed six hundred (600) feet in length and shall have a turn-around of not less than one hundred (100) feet in diameter in residential areas and not less than two hundred (200) feet in diameter in commercial and industrial areas.

(9) MARGINAL ACCESS STREETS. Where a subdivision has frontage on an arterial street there shall be provided a mar-

ginal access on both sides or on the subdivision, unless the adjacent lots back up to the arterial street, or unless the board determines that such marginal access streets are not desirable under the facts of a particular case for adequate protection of lots and separation of through and local traffic.

(10) STREETS ON MASTER PLAN. Where a subdivision embraces a street, as shown on the Master Plan, such street shall be platted in the location and of the width indicated by the Master Plan.

(11) MINOR STREETS. Minor streets shall be laid out so as to discourage their use by through traffic.

(12) PAVEMENT WIDTHS AND RIGHT-OF-WAY. Pavement widths and right-of-way of interior streets shall be as follows:

(a) Arterial streets shall have a right-of-way width of at least one hundred (100) feet, with a pavement width of at least forty-eight (48) feet, or as otherwise required by the commission.

(b) Collector streets shall have a right-of-way of at least sixty-eight (68) feet and a pavement width of at least forty-eight (48) feet.

(c) Minor streets shall have a right-of-way width of at least fifty (50) feet and a pavement width of at least thirty (30) feet.

(d) Nonresidential marginal access streets shall have a right-of-way width of at least fifty-five (55) feet and a pavement width of at least forty-four (44) feet, unless otherwise approved by the board.

(e) Residential marginal access streets shall have a right-of-way width at least forty (40) feet and a pavement width of at least thirty (30) feet.

(13) PAVEMENT WIDTHS AND RIGHT-OF-WAY OF STREETS FORMING PART OF THE BOUNDARY OF THE SUBDIVISION (ADJACENT) SHALL BE AS FOLLOWS:

(a) The subdivider shall dedicate a right-of-way of fifty (50) feet in width for new adjacent arterial streets, and he shall pave thirty-three (33) feet of such right-of-way.

(b) New adjacent collector, minor or marginal access streets shall conform to subdivision (12) of this subsection.

(c) Where the proposed subdivision abuts upon an existing street or half street that does not conform to subdivision (12) of this subsection, the subdivider shall dedicate right-of-way sufficient to make the full right-of-way width conform to such subdivision, and he shall pave so much of such right-of-way as to make the full pavement width comply with such subdivision. Before pavement is laid to widen existing pavement, the existing pavement shall be cut back two (2) feet to insure an adequate sub-base and pavement joint.

(d) The required right-of-way dedication shall also apply to plats wherein a parcel of land is platted or replatted as a single lot. (Ord. No. 2589, § 3, 5-19-70)

Amendment note—Ord. No. 2589, § 3, amended § 9(B)(13) by adding subparagraph (d).

(14) CURBS. Curbs shall be installed by the subdivider on both sides of all interior streets and on the subdivision side of all streets forming part of the boundary of the subdivision.

(15) STREET NAMES. Names of new public streets shall not duplicate or cause confusion with the name of existing streets, unless the new public street is a continuation of, or is in alignment with, an existing street, in which case the name of the existing street shall be used. The naming of private streets or drives is prohibited, unless such names are approved by the planning board. (Ord. No. 2572, § 1, 2-17-70)

Amendment note—Ord. No. 2572, § 1, amended subsection (B) (15) by making the first sentence applicable to public streets and adding the second sentence re private streets.

(16) STREET SIGNS. All necessary street signs including street name signs and regulatory signs, shall be installed by the city at all intersections within or abutting the subdivision. Such signs shall be of the standard type used by the city and shall be installed in accordance with standards of the city. No signs will be placed by the city in undeveloped portions of the subdivision.

(C) *Alleys.*

(1) WIDTH AND PAVING. In residential areas alleys may be provided. Where provided alleys shall not be less than twenty (20) feet in right-of-way width and shall have a paved concrete surface of not less than nine (9) feet in width, constructed over two (2) inches of compacted river sand and shall be installed by the subdivider in accordance with city standards. Alleys shall be approximately parallel to the frontage of the street. In all business areas, alleys of not less than twenty-five (25) feet in pavement width shall be installed by the subdivider; provided, however, that the city planner may authorize alleys twenty (20) feet in right-of-way and pavement width when, in his judgment, alleys twenty-five (25) feet wide are not justified by the circumstances. (Ord. No. 2308, § 1, 3-2-67; Ord. No. 2516, § 1, 7-15-69)

Amendment note—Ord. No. 2308 and Ord. No. 2516 have amended § 9(C)(1), the nature and extent of which render a detailed analysis impractical.

(2) INTERSECTING ALLEYS OR UTILITY EASEMENTS. Where two alleys or utility easements intersect, or turn at a right angle, a cutoff of not less than ten (10) feet from the normal intersection of the property or easement line shall be provided along each property or easement line.

(3) DEAD-END ALLEYS. Dead-end alleys shall not be permitted.

(4) ALLEYS WHICH DO NOT CONNECT ON A STRAIGHT COURSE. If the alleys are not themselves straight within each block, or if the same do not connect on a straight course with the alleys of adjoining blocks, then an easement shall be provided for the placing of guy wires on lot division lines in order to support poles set on curving or deviating rights-of-way of alleys.

(5) MAIN DRIVEWAYS OPENING ON STREET. Except on a corner lot, each residential lot shall have the main driveway to the garage, carport or off-street parking area opening on a street. (Ord. No. 2516, § 2, 7-15-69)

Amendment note—Ord. No. 2516 amended App. A, § 9(C) by adding § 9(C)(5).

(D) *Utility easements.*

(1) If a developer elects not to provide alleys as stated in subsection (C) of this section, he may provide utility easements in accordance with the following requirements: Such utility easements shall be provided at the rear of all lots. Utility easements shall be a minimum of fifteen (15) feet in width, centered on the common rear lot line of two (2) abutting lots and shall be continuous for the entire length of the block. Utility easements shall be approximately parallel to the frontage of the street. Structures of a permanent nature shall not be placed within easements, except however, common fences may be placed along property lines. The developer shall make these lots subject to a restrictive covenant prohibiting the placing of garbage containers or any refuse for pickup by the refuse collection agency any closer to the street than the house or other building on the lot, except that underground containers could be used. (Ord. No. 2516, § 3, 7-15-69)

Amendment note—Ord. No. 2516 amended § 9(D)(1) by making extensive changes, the nature of which renders a detailed analysis impractical.

(2) Maintenance of the easement shall be the responsibility of the owner of the land upon which it is located. It shall be the duty of the property owner to keep the area across, over or under this easement clear of any structure, debris, vegetation, trees, shrubs, or landscaping whatsoever except that lawn grass which shall be regularly mowed and controlled may be grown thereon. (Ord. No. 2516, § 4, 7-15-69)

Amendment note—Ord. No. 2516 amended App. A, § 9(D)(2) by deleting the last sentence thereof, which had provided that owners of property upon which a utility easement was located could fence across the easement if proper gates were provided.

(3) Normal curb exposure shall be required where utility easements intersect streets.

(4) Where utility easements are not themselves straight within each block, or if the same do not connect on a straight course with the utility easements of adjoining blocks, then an additional easement shall be provided for the placing of guy wires on lot division lines in order to support poles set on curving or deviating rights-of-way of alleys.

(E) *Sidewalks.* Sidewalks shall be installed in accordance with the provisions of Ordinance No. 1987.

(F) *Water.*

(1) WATER SUPPLY AND DISTRIBUTION. All subdivisions shall be provided by the subdivider with water supply and water distribution systems approved by the city water department.

(2) FIRE HYDRANTS. Fire hydrants in accordance with city standards shall be installed as part of the water distribution system by the subdivider so that every lot is within five hundred (500) feet of a fire hydrant or as approved by the Texas Insurance Commission.

(G) *Sewers.*

(1) All subdivisions shall be provided by the subdivider with an approved sewage disposal system.

(2) Connection with the sanitary sewer system shall be required except where the director of public utilities determines that such connection will require unreasonable expenditure when compared with other methods of sewage disposal. Where septic tanks are installed, it will be necessary to request the health department to conduct the necessary percolation tests to determine the adequacy of the soil. The design for the system will be in accordance with the state health department requirements. If the subdivider proposes to install a sanitary sewer disposal system, the plans for such a system must be approved by the state health department prior to approval of the final plat by the board.

(H) *Utility lines.* All utility lines that pass under a street or alley shall be installed before the street or alley is paved. When it is necessary that utility lines pass under the street or alley pavement, they shall be installed to a point at least three (3) feet beyond the edge of the pavement. All necessary utilities shall be installed before building permits and/or certificates of occupancy are issued for work within the subdivision.

(I) *Traverse closure and monuments.* All perimeter surveys of the final plat of the area to be subdivided shall have a maximum error of closure of not more than 1:5000 and an angular error not exceeding 15 seconds per instrument station.

Monuments shall be set and located at each corner of the area to be subdivided. A permanent marker of at least ½ inch diameter shall be used to delineate all points of curvature and block corners throughout the subdivision.

(J) *Drainage.*

(1) EASEMENT. Where a subdivision is traversed by a watercourse, drainage way, natural channel or stream, there shall be provided an easement or right-of-way conforming substantially to the limit of such watercourse, plus additional width to accommodate future needs.

(2) DRAINAGE FACILITIES. Drainage facilities shall be provided and constructed by the subdivider as specified by the director of public works.

(K) *Blocks.* Block lengths shall not exceed eighteen hundred (1800) feet, or be less than six hundred (600) feet, except where the board finds specific conditions to exist making strict compliance unnecessary.

(L) *Lots.*

(1) SEWERED LOTS. Where off-lot sewage is provided, each residential lot shall have an area of at least seven thousand two hundred (7,200) square feet and shall be at least sixty (60) feet wide. In case of irregularly shaped lots, the minimum width shall be forty (40) feet measured at the front building line. Lots in a mobile home subdivision shall have an area of not less than five thousand (5,000) square feet and shall be not less than fifty (50) feet wide measured at right angles to the side lot lines. In the case of irregularly shaped lots, the minimum width shall be forty (40) feet measured at the front building line. (Ord. No. 2589, § 1, 5-19-70; Ord. No. 2752, § 2, 11-7-72)

(2) UNSEWERED LOTS. Where off-lot sewage is not required and is not provided, residential lots shall have an

area of at least nine thousand (9,000) square feet, shall be at least one hundred and twenty (120) feet deep and shall be at least sixty (60) feet wide. Where, as the result of the percolation tests prescribed in subsection (G) of this section, the director of public utilities deems the minimum lot area insufficient, the commission shall require additional lot area sufficient to accommodate the sanitary facilities deemed necessary by the director of public utilities.

(3) CORNER LOTS. Corner lots shall be at least ten feet (10′) wider than the minimum interior lot.

(4) FRONTAGE. Each lot shall front upon a public street. Lots of irregular shape shall not be allowed unless they have a street frontage of at least thirty (30) feet and a minimum width of sixty (60) feet, measured at the mid-point of the lot depth.

(5) SIDE LOT LINES. Side lot lines shall be substantially at right angles to straight street lines and radial to curved street lines.

(6) MINIMUM SETBACK LINES. Minimum front building setback lines shall be required of at least twenty-five (25) feet. Where a corner lot is a key lot, it shall have a minimum building setback line on the side street of at least fifteen (15) feet. Lots in a mobile home subdivision shall have a front building setback of not less than twenty (20) feet. A corner lot shall have a minimum setback on the side street of at least fifteen (15) feet. (Ord. No. 2752, § 2, 11-7-72)

(7) REAR YARDS. Minimum rear yard depths shall be required of at least twenty per cent (20%) of the depth of the lot. However, the depth need not exceed thirty-five (35) feet from the center line of the alley or rear utility easement. Minimum rear yard setbacks in mobile home subdivisions shall be ten (10) feet. (Ord. No. 2752, § 2, 11-7-72)

(8) SIDE YARD. Minimum side yards on each side of buildings on interior lots and on the building side of corner lots shall be five (5) feet.

(9) EXTRA DEPTH AND WIDTH IN CERTAIN CASES. Where a lot in a residential area backs up to a railroad

right-of-way, a high pressure gas line, oil or gasoline storage tanks, an arterial street, an industrial area or other land use which has a depreciating effect or is hazardous to the residential use of property, and where no marginal access street or other street is provided at the rear of such lot, additional lot depth shall be required by the board. In no case shall a depth in excess of one hundred and fifty (150) feet be required. Where a

lot sides to any of the above, additional lot width shall be required by the board, but in no event shall a width in excess of one hundred (100) feet be required.

(10) LOT COVERAGE. The combined ground floor areas of all buildings on a lot occupied by a residential dwelling unit shall not cover more than forty per cent (40%) of the lot area. (Ord. No. 2589, § 2, 5-19-70)

(M) *Plat required.* Hereafter every owner of any tract of land situated within the corporate limits, or within five miles of the corporate limits of Wichita Falls, Texas, who may hereafter divide the same into two or more parts, shall cause a master plat to be made thereof. The master plat shall be required whether the owner or someone acting for the owner divides the land or sells or gives away a portion of his land. This master plat shall accurately describe all of said tracts, subdivisions or additions by metes and bounds and locate the same with respect to an original corner of the original survey of which it is a part, giving the dimensions thereof of said tracts, subdivisions, or additions, and dimensions of all streets, alleys, squares, parks or other portions of same intended to be dedicated to public use or for the use of purchasers or owners of lots fronting thereon or adjacent thereto. (Ord. No. 2386, § 2, 1-22-68)

(N) *Replat required.* A replat shall be required when new construction will cross an established lot line or violate side-yard setback requirements. (Ord. No. 2589, § 4, 5-19-70)

(O) *Development standards for townhouse subdivisions.* Townhouse subdivisions shall conform to the following basic development standards, notwithstanding different standards required in these subdivision regulations of other type subdivisions, to-wit:

(1) Minimum common open space. The minimum common open space shall comprise thirty per cent (30%) of the total gross area of the site.

(2) Minimum lot width. Minimum lot width shall be twenty (20) feet.

(3) Minimum lot area. Each lot shall have an area of at least two thousand (2,000) square feet.

(4) Minimum space between structures. There shall be minimum space of ten (10) feet between structures.

(5) Number of dwelling units per structure. The maximum number of connected dwelling units per structure shall be ten (10).

(6) Minimum front setback. A minimum front setback will be required and shall be based on the following:

(a) Front or rear lot access.

(b) On-street parking capabilities.

(c) Number of parking spaces on each lot.

(d) Number of overflow off-street parking spaces.

(e) Where townhouse lots and dwelling units are designed to face upon a common open space courtyard rather than a public street, a rear yard setback will be required.

(7) All utilities shall be underground. (Ord. No. 2767, § 4, 2-20-73)

Sec. 10. Responsibility for payment of installation costs.

(A) The subdivider shall pay all design, engineering, material, construction and installation costs of all improvements required by this ordinance unless otherwise provided in this section.

(B) In the event a subdivider desires the extension of water or sewer lines to serve his subdivision, he shall bear the entire design, engineering, material, construction and installation cost of all border, off-site and on-site lines. Under subsection (D) of section (9), the director of public utilities shall specify the size of all such lines, taking into consideration the requirements of adjacent areas of future growth which must be served by such lines. The decision of the director of public utilities concerning the size of the required lines shall be final.

(C) The construction of water and sewer lines in accordance with city plans and specifications will be done by a contractor of the subdividers choice; provided however, that such contractor shall furnish a performance bond, executed by a corporate surety authorized to do business in the State of Texas acceptable to the city and maintaining in Wichita County an agent upon whom service of citation may be had, in an amount equal to the total construction cost. Said bond shall be conditioned upon:

(1) Completion of the entire construction in full conformity with the plans and specifications promulgated or approved by the director of public utilities, and

(2) Payment in full by the contractor of all claims for labor performed or materials furnished, in connection with such construction. All such construction work shall be subject to inspection by the director of public utilities, and no portion of any line installed in any excavation shall be covered unless and until the construction of such portion shall have been inspected and approved by the director of public utilities.

(D) Should the director of public utilities require the installation of water and sewer lines of a larger diameter than necessary to provide adequate water or sewer service to the subdivider's property, the difference between the cost of such larger lines and size line required to serve the subdivision will be paid for by the City of Wichita Falls. Such lines will

be constructed under contract awarded by the city, with a predetermined rate for the developer's share of the cost of the line to be deposited with the city prior to award of the contract.

The pro rata share of the cost shall include all material, construction and installation costs for the size line adequate to serve the developer's property.

(E) Where an existing water or sewer line lies within or abuts the subdivision, the subdivider shall make no connections to or extension of such existing line without first paying to the city the cost of the size line of equal length to that portion of such existing line which lies within or abuts the subdivision which would be required to serve the subdivision. This cost shall be determined by the director of public utilities and his decision shall be final.

(F) All sewer and water lines constructed or installed pursuant to the provisions of this ordinance shall, when completed and accepted by the director of public utilities, become the property of the city, free and clear of all encumbrances. Each and every contract entered into between a subdivider and a contractor for the installation of sewer or water lines pursuant to the provisions of this ordinance shall recite therein the provisions of this subsection.

(G) No sewer or water lines shall be installed or constructed except within a public street or alley, or within an easement granted to the city by appropriate written instrument filed for record with the county clerk of Wichita County at the expense of the person requesting the extension of existing lines.

(H) No lift station, sanitary sewer siphon, or force main shall be constructed as a part of the sewer line extension unless the subdivider agrees that he will, at his own expense, construct such elements in accordance with the design standards provided by the director of public utilities or in the case of lift stations a design using a dry and wet well installation prepared by the subdivider's engineer and approved by the director of public utilities, or a prefabricated installation of

similar design and considered equal by the director of public utilities. Developer shall furnish to the city a maintenance bond, with an approved surety, in an amount equal to twenty-five per cent (25%) of the total cost of construction of the lift station, conditioned that the subdivider shall pay all costs of maintaining, repairing and replacing any defective parts or equipment for a period of one (1) year after the pump station is accepted by the city. (Ord. No. 2522, § 1, 8-19-69)

Amendment note—Ord. No. 2522 amended § 10(H) by deleting therefrom the requirement that developers agree to pay city a lump sum and the table from which said sum was to be computed, and the provisions requiring a refund of a pro rata amount of the sum if future extension of sewer mains makes the operation of the lift station unnecessary before 5 years has terminated. In lieu of these deletions was substituted the requirement of a surety bond.

(I) If the board requires the installation of any street with pavement over forty-eight (48) feet, the city shall award the contract for construction and the developer shall deposit his share of the cost of construction with the city prior to award of the contract. The developer's share of the cost will include curb and gutters and pavement for a forty-eight (48) foot street.

(J) In no event shall the city be obligated to proceed under the terms of this section if sufficient funds are not available or if, the planning board finds the extension is not in the public interest. Nothing in this ordinance shall be construed as a surrender by the city of its control over the streets, alleys, public ways or public easements.

(K) No person shall acquire any vested rights under the provisions of this section.

(L) *Withholding Improvements Until Plat Approved.*

(1) The city shall withhold all city improvements of whatsoever nature including the furnishing of sewage facilities and water service from all subdivisions, which have not been approved as provided by law and further, no permit shall be issued by the building inspector of the city on any piece of property other than an original or a resubdivided lot in a duly approved and recorded subdivision, except the building inspector may issue a temporary connection of utilities permit for

construction purposes and only during the time of actual construction on unplatted tracts of land if the owner of such property will sign an agreement stating that he will forthwith start proceedings to have such property approved and platted in accordance with these regulations and further acknowledge his understanding that a certificate of occupancy and a permanent permit for connection of public utilities shall be withheld until the platting of such property has been so approved and recorded.

The temporary permit shall automatically terminate within one hundred (100) days from its issuance date or upon completion of construction. The master plat must be approved and recorded within one hundred (100) days from the temporary building permit issuance date.

The following is the procedure required for the owner of such property to follow before entering into a platting agreement:

(a) Contact a licensed land surveyor or registered professional engineer, and cause a preliminary plat of the property to be prepared.

(b) Cause a reproducible sepia and nine (9) copies of this preliminary plat to be delivered to the secretary of the planning commission for circulation to various city departments for their review and approval.

(c) Cause an abstractor's or lawyer's certificate of ownership to be prepared and furnished to the city planner.

(d) Cause a dedication instrument to be prepared covering the dedication of property for public use, as determined by existing ordinances of the city. All lienholders of record shall be required to subordinate their lien on the property dedicated for public use. These instruments shall be placed in the custody of the city planner to be recorded by said city planner in the county clerk's office of Wichita County, Texas, in the event that the person executing a platting agreement fails to complete the platting process forthwith as agreed.

(2) The building inspector shall not issue a platting agreement until he has received approval from the following departments: Planning, Engineering, Traffic, Water, Sewer, Park and Recreation. (Ord No. 2386, § 3, 1-22-68)

Amendment note—Ord. No. 2386, § 3, amended § 10(L) to read as set out. Due to the nature of the subject matter, a detailed analysis of such amendment is not included.

Sec. 11. Parks.

(A) All subdividers shall be required to set aside land for park purposes under conditions set out in paragraph (B) of this section when the master park plan of the City of Wichita Falls shows a park is required in the area to be subdivided and the subdivider shall show such land set aside in compliance with this section on the master plat or preliminary plat. All areas set aside for park purposes shall conform to the master park plan as to general location, area and type of development. The parks and recreation department should be consulted when developing the master plat so that few revisions will be necessary later.

(B) The city shall be granted an option to purchase the land so set aside for park purposes upon the following terms. If at the end of one year from the date of approval by the board of the master plat or preliminary plat if there is no master plat, the total area covered by said plat has been at least fifty per cent (50%) developed, then and in that event the city shall be required to exercise its option within thirty (30) days thereafter or release the same to the subdivider

with the purchase price to be computed as set out in paragraph (C). If at the end of one year there has not been a fifty per cent (50%) development, then and in that event the option shall continue in full force and effect until said total area has been at least fifty per cent (50%) developed with the city then required to exercise or release its option as set out above.

(C) The price to be paid by the city for the land set aside for park purposes shall be based on the fair market value of the raw land as of the date the master or preliminary plat is first filed with the board, plus the pro rata part of all development cost attributable to the park land so purchased, including abutting streets and utilities necessary to serve the park land.

(D) All subdividers shall also submit on the master plat an indication showing how the park area is to be developed in the event the city is unable to purchase the property or rejects it because of other reasons.

(E) All areas reserved for park land shall conform to the City of Wichita Falls master park plan as to general location, area and type of development. The city shall have the right to accept or reject park land proposals as shown on the developer's master plat, at such time as the master plat is brought before the board for approval. The one year option period, which the city has to buy the land, shall begin with the planning board's approval of the developer's master plat.

Sec. 12. Representation of plat.

The planning board will automatically postpone action on any preliminary or final plat if not represented by the subdivider or an appointed representative at the meeting for which the plat is scheduled; except that the subdivider may be excused if good reason for his absence is given and accepted by the chairman or secretary of the planning board.

Sec. 13. Penal provisions.

If any individual (including any officer, agent or employee acting in behalf of any individual, firm, association or cor-

poration) violates any provision of this ordinance within the corporate limits of the City of Wichita Falls, Texas, he shall be guilty of a misdemeanor, and, upon conviction of such violation in the corporation court of the City of Wichita Falls, Texas, he shall be fined an amount not exceeding one hundred dollars ($100.00). Each day that such violation continues shall be a separate offense. Prosecution or conviction under this provision shall never be a bar to any other remedy or relief for violations of this ordinance.

Sec. 14. Enforcement other than penal.

(A) No permit shall be issued by the city for the installation of septic tanks upon any lot in a subdivision for which a final plat has not been approved or on a lot in a subdivision in which the standards contained herein or referred to herein have not been complied with in full.

(B) No building, repair, plumbing or electrical permit shall be issued by the city for any structure on a lot in a subdivision in which a final plat has not been approved or on a lot in a subdivision in which the standards contained herein or referred to herein have not been complied with in full.

(C) The city shall not repair, maintain, install or provide any streets or public utility services in any subdivision for which a final plat has not ben approved or in which the standards contained herein or referred to herein have not been complied with in full.

(D) The city shall not sell or supply any water, gas, electricity or sewerage service within a subdivision for which a final plat has not been approved or in which the standards contained herein or referred to herein have not been complied with in full.

(E)* In behalf of the city, the city attorney may institute appropriate action in the district court to enjoin any violation of this ordinance or the standards referred to herein which violation occurs within the city limits or within the extra-territorial jurisdiction of the city as such jurisdiction is determined under the Municipal Annexation Act.

(F) If any subdivision exists for which a final plat has not been approved or in which the standards contained herein or referred to herein have not been complied with in full, the city attorney may, in behalf of the city, cause an instrument to be filed in the deed records of the county or counties in which such subdivision or part thereof lies. The instrument

*Charter references—Annexation of territory, by vote of people, § 3; by petition, § 4.
State law references—Municipal Annexation Act, Vernon's Ann. Civ. St. art. 970a; authority of home rule cities to annex territory, art. 1175(2).

may state the fact of such noncompliance or failure to secure final plat approval and the fact that the provisions of paragraphs A, B, C and D of this section will apply to the subdivision and the lots therein. If full compliance and final plat approval are secured after the filing of such instrument, the city attorney shall forthwith file an instrument in the deed records of each such county stating that paragraphs A, B, C and D no longer apply.

Sec. 15. Severability.

If any section, subsection, clause, phrase or sentence of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this ordinance which can be given effect without invalid provision or application, and to this end the provisions of this ordinance are declared to be severable.

Sec. 16. Repeal of conflicting ordinances and resolutions.

All ordinances and resolutions of the City of Wichita Falls, Texas, in conflict herewith are hereby expressly repealed.

Sec. 17. Emergency clause.

The fact that the existing rules and regulations governing the platting and subdividing of land are inadequate and effective rules are needed for the preservation of the public health, safety and welfare of the City of Wichita Falls and its citizens, creates an emergency that requires that this ordinance shall become effective immediately.

PASSED AND APPROVED this 28th day of September, 1964.

/s/ J. Winston Wallander

Mayor

ATTEST:
/s/ Henry Mundy

City Clerk

[The next page is 1607]

APPENDIX H

IN THE SUPREME COURT OF TEXAS
Austin, Texas

Docket No. B-5593

CITY OF WICHITA FALLS
Petitioner

vs.

STATE OF TEXAS
EX REL RICHARD VOGTSBERGER
Respondent

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

TO GARSON R. JACKSON, CLERK OF THE SUPREME COURT OF TEXAS:

The State of Texas, Respondent, pursuant to Rule 10 of the Rules of the United States Supreme Court hereby gives notice of appeal from the opinion and judgment rendered herein by the Supreme Court of Texas to the United States Supreme Court.

The State of Texas requests the Clerk of this Court to certify to the United States Supreme Court the following portions of the record herein:

1. Entire transcript from the Seventy-eighth District Court of Wichita County, Texas.

2. Opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas in Cause No. 17,636 entitled *City of Wichita Falls, Texas, Appellant vs. State of Texas Ex Rel Richard Vogtsberger, Appellee.*

3. Notation of the Supreme Court of Texas granting the application of the City of Wichita Falls for Writ of Error in this cause, 19 Tex. Sup. Ct. Jo. 10, p. 88.

4. Opinion of the Supreme Court of Texas in this cause delivered March 3, 1976.

5. Judgment of the Supreme Court of Texas in this cause.

6. Notation of the Supreme Court of Texas dated March 31, 1976 overruling the Motion for Rehearing of the State of Texas.

7. The Conditional Application for Writ of Error filed by the State of Texas.

8. The Answer of the State of Texas to the Application for Writ of Error of the City of Wichita Falls.

9. The Supplemental (Post-Submission) Brief of the State of Texas filed herein.

10. The motion of the State of Texas for a rehearing in this cause.

The party taking this appeal is the State of Texas, Plaintiff in the Trial Court, Appellee in the Court of Civil Appeals for the Second Supreme Judicial District of Texas and Respondent in the Supreme Court of Texas.

This appeal is taken pursuant to 28 U.S.C. §1257(2) and is requested to be treated alternatively as an Application for Certiorari to the United States Supreme Court pursurant to 28 U.S.C. §2103.

Paul O. Wylie
County Attorney
Archer County, Texas

DOUTHITT & MITCHELL
Frank J. Douthitt
P. O. Box 549
Henrietta, Texas 76365

ATTORNEYS FOR THE
STATE OF TEXAS

by _____
Frank J. Douthitt

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. 75-1886

THE STATE OF TEXAS
EX REL RICHARD VOGTSBERGER,
Appellant - Petitioner

vs.

THE CITY OF WICHITA FALLS, TEXAS
Appellee - Respondent

MOTION TO DISMISS

or in the alternative,

MOTION TO AFFIRM

HENRY P. HODGE JR.
City Attorney
Room 108
1300 Seventh Street
Wichita Falls, Texas 76301
Attorney for Appellee - Respondent

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. 75-1886

THE STATE OF TEXAS
EX REL RICHARD VOGTSBERGER,
Appellant - Petitioner

vs.

THE CITY OF WICHITA FALLS, TEXAS
Appellee - Respondent

MOTION TO DISMISS

or in the alternative,

MOTION TO AFFIRM

Comes now the City of Wichita Falls, Texas, and respectfully moves the court to dismiss the appeal in this cause, or in the alternative, to affirm the judgment of the Supreme Court of Texas, on the grounds hereinafter set out.

GROUNDS

1. The federal question sought to be reviewed herein was not timely nor properly raised nor expressly passed on by the state courts.

2. The appeal does not raise a substantial federal question.

FIRST GROUND RESTATED

The federal question sought to be reviewed herein was not timely nor properly raised nor expressly passed on by the state courts.

The federal question raised in this appeal is as follows: Is a single newspaper publication adequate notice as required by the due process clause of the Fourteenth Amendment as a prerequisite to annexation hearings leading to final passage of ordinances including rural territory within a city, when there is no reason that personal notice to affected property owners cannot be given?

In effect, this is an attack on the constitutionality of Section 6 of Article 970a, Revised Civil Statutes of Texas, which requires that a city hold a public hearing prior to annexation proceedings, and that notice of such hearing be published at least one time in a newspaper having general circulation in the city and in the territory proposed to be annexed (it requires no personal notice, except to railroad companies whose right-of-way is included in the territory to be annexed).

This question was not pleaded in the trial court, and it was not timely nor properly raised nor expressly passed on by the Texas Supreme Court.

With regard to the pleadings, the only pleading made by the State raising a constitutional question was Paragraph 13, which said, inter alia:

"The process of annexation and the resulting expansion of the extraterritorial jurisdiction violates the equal protection and due process clauses of the United States and Texas constitutions in that such process is a taking of property without compensation and without representation of and by the damaged person or persons. The process is a unilateral action by the Respondent. . . . This unilateral action effectively preempts the territory within such extraterritorial jurisdiction and prevents the free use thereof by its owners, including the Relator."

Obviously, this pleading does not allege that the city unconstitutionally failed to give the owners of the land personal notice. It is alleging that the annexation of land by a city, without the request nor consent of the owners of such land, which owners have no representation on the governing body of the city, constitutes an unconstitutional taking of such land. Therefore, this pleading did not raise the question presented in the present appeal.

The only pleading by the State in the trial court attacking the notice was in Paragraph 10 (TR 32) which alleged that the notice was insufficient as a matter of law in that it failed to state what county the territory to be annexed is situated in. The implication of this pleading is, of course, that the published notice would not be objectionable if it had named the county. It was not an allegation that the notice should have been served personally,

rather than by publication in a newspaper.

Further, the question was not timely nor properly raised nor expressly passed on by the Texas Supreme Court. In its Conditional Motion for Rehearing in the Court of Civil Appeals, and in its Conditional Application for Writ of Error, the State brought forward only the question of the sufficiency of the description of the property annexed (and one other point not material here). Here again, the implication was that, if the description had been sufficient, the published notice would not have been objectionable.

Rule 476, Texas Rules of Civil Procedure, states, "Trials in the Supreme Court shall be only upon the questions of law raised by the assignments of error in the application for writ of error . . ."

In Pacific Fire Insurance Company vs. Donald, 224 SW2d 204 (Tex. S. Ct., 1949) the Supreme Court stated, "This Court is limited to a consideration of the points contained in an application for writ of error, and all other points relied upon in the trial court and Court of Civil Appeals, and not contained in the application for writ of error, are waived."

Therefore, the question as to whether the due process clause required that the City give personal notice to affected property owners prior to the annexation was not considered nor passed on by the Texas Supreme Court.

SECOND GROUND RESTATED

The appeal does not raise a substantial federal question.

The State of Texas has cited no cases holding

that the due process clause requires personal notice to a landowner that his property is being considered for annexation by a city. Their authorities concern suits to settle accounts of pooled trusts, eminent domain cases, cases where water is diverted from a river, and class actions against brokerage firms for violations of antitrust and securities laws.

On the other hand, there is case law contrary to the position which the State of Texas has taken in this appeal. In Hunter vs. City of Pittsburgh (1907), 207 U.S. 161, 52 L. Ed. 151, 28 S. Ct. 40, certain landowners whose land had been annexed to the City of Pittsburgh, without their consent and against their protests, alleged that this deprived them of their property without due process of law, by subjecting it to the burden of additional taxation. This Court overruled this contention, saying that the City of Pittsburgh could take this action, in the manner in which they did it, unrestrained by any provision of the Federal Constitution.

In City of Cedar Rapids vs. Cox (Iowa Supreme Court, 1958) 93 NW2d 216, appeal dismissed, 3 L. Ed.2d 976, certain landholders contended that the state statute authorizing notice of proceedings for annexation of territory to a city by publication violates the due process requirements of the Federal Constitution. This is exactly the same position that the State of Texas is taking in this appeal. The Supreme Court of Iowa overruled this contention. The landowners in that case also relied on Mullane vs. Central Hanover Bank & Trust Company, but the Iowa Supreme Court held that such case was inapplicable here. The Court followed Hunter vs. City of Pittsburgh instead. The Iowa

Court said, "To uphold the contention of Appellants now considered might put in jeopardy numerous decrees of annexation on notice by publication. Obviously we should not reach a decision of such far-reaching implications unless the right thereto is clear."

On May 18th, 1959, the United States Supreme Court dismissed the appeal in Cedar Rapids vs. Cox for want of a substantial federal question.

CONCLUSION

As the federal question sought to be reviewed herein by the State of Texas was not timely nor properly raised nor expressly passed upon by the State courts and as the appeal does not raise a substantial federal question, the City of Wichita Falls prays that this appeal be dismissed, or in the alternative, that the judgment of the Supreme Court of Texas be affirmed.

Respectfully submitted,

Henry P. Hodge, Jr.
City Attorney
Room 108
1300 Seventh Street
Wichita Falls, Texas 76301

Attorney for the City of
Wichita Falls, Texas,
Appellee - Respondent

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the above and foregoing motion on the Appellant - Petitioner, State of Texas, by depositing two copies of same in the United States Post Office, addressed to Douthitt & Mitchell at their post office address, and by depositing one copy in the United States Post Office, addressed to Paul O. Wylie, at his post office address, with first class postage prepaid, on the 4th day of October, 1976.

Henry P. Hodge, Jr.
Attorney for Appellee - Respondent